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No. 780

IN THE

SUPREME COURT OF THE UNITED STATES.

PEORIA TRANSIT LINES, INC., a Corporation,
Appellant,

v.

CITY OF PEORIA, a Municipal Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

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OPINION OF THE COURT BELOW.

This appeal is from a judgment of the Supreme Court of Illinois which affirms a judgment, entered on motion for summary judgment without opinion, by the Circuit Court of Peoria County, Illinois, and the opinion of the Illinois Supreme Court is reported in Volume 144, Northeastern Reporter (2nd), page 609, and in the official Illinois Reports, Volume 11 Illinois (2nd), page 520. A copy of said opinion is attached hereto and made a part hereof (Appendix A) as required by Rule 15 of the rules of this Court.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 (2) and 2101 (B) for the reason that there is drawn in question the validity of purported city ordinance having the effect of a state law, on the ground that said ordinance is repugnant to the constitution of the United States of America in that it deprives appellant of property without due process of law in violation of the 14th Amendment of the Constitution of the United States of America.

The judgment and opinion appealed from was entered and filed on May 23rd, 1957, and became final on the 16th day of September, 1957, by the action of the Supreme Court of Illinois in entering an order denying this appellant's motion for a rehearing.

A notice of appeal to this Court was filed in the Supreme Court of the State of Illinois on the 11th day of December, 1957, and this Court's jurisdiction to review the judgment and the opinion of the Supreme Court of Illinois is specifically conferred by Title 28, United States Code, Sections 1257 (2) and 2101 (B). The following cases sustain appellant's contention that this Court has jurisdiction of this appeal. Jamison v. State of Texas, 318 U. S. 413; John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 267; Beard v. City of Alexandria, La., 341 U. S. 622; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547.

ORDINANCES INVOLVED.

The ordinances referred to above are "City of Peoria Municipal Ordinances", numbers 5397 and 5464, which amended Ordinance Number 5397, the pertinent text of which is set forth in Appendix B hereof.

QUESTIONS PRESENTED.

1. Appellant is entitled to a review by this Court where the State Court refused to decide the Federal Constitutional questions properly presented, and upheld an ordinance, the validity of which was drawn in question, on unsubstantial, illusory and untenable non-Federal grounds which were completely unsupported by the record, nonexistent, and beyond the contentions of the parties.

2. Does the enforcement of an invalid ordinance which the City of Peoria had no power to enact, and the collection of a percentage of appellant's gross revenue as a tax as "compensation for the use by the Company of the

City streets" (R. 21), violate the XIV Amendment to the Constitution of the United States of America by confiscating appellant's property without due process of law?

STATEMENT OF CASE.

Subsequent to the institution of this suit, Peoria Transit Lines, Inc. (designated as the defendant-appellant herein), was dissolved and all of its assets and liabilities were transferred to Peoria City Lines, Inc., in exchange for all of its outstanding stock (Abs. 5, 6). Under date of May 3rd, 1955, the Illinois Commerce Commission entered an order authorizing and directing Peoria City Lines, Inc., to take over the operation of the transportation system serving the cities of Peoria, East Peoria and Peoria Heights, and to conduct said operation "in compliance with all other applicable provisions of the Illinois Public Utilities Act and the rules and regulations of this Commission promulgated thereunder". All operating rights granted by the Commerce Commission were transferred to Peoria City Lines, Inc., by said order (Exhibit E, attached to and made a part of the original Complaint).

Since May 5th, 1955, Peoria City Lines, Inc., has operated this transportation system which serves the three Cities of Peoria, Peoria Heights and East Peoria under the authority of and subject to regulation by the Illinois Commerce Commission. During all of said time Peoria City Lines, Inc., has refused to pay the City of Peoria any compensation claimed to be due by it or the predecessor company under the purported contract or ordinance.

Judgment below having been entered on motion for summary judgment, the material facts are contained in the pleadings and supporting affidavits. The complaint sets forth a detailed history of the acquisition by appellant of this property, its certificates of convenience and necessity from the Illinois Commerce Commission and the enactment of the ordinance and the amendment thereto (original complaint).

The ordinance required the Company to pay a tax based upon a percentage of gross revenue as "compensation" for the Company's use of the public streets (Appendix B). From and after September 17, 1946, the Peoria Transportation Company (name subsequently changed to Peoria Transit Lines, Inc.), operated the transportation system in Peoria and vicinity. Compensation payments purportedly required by the ordinance were paid by the Company through December 31st, 1953. No payments have been made to the City since that time and the judgment in this case covers the period from January 1, 1954 through May 3rd, 1955.

On September 7, 1954, appellant filed its motion to dismiss the complaint on the grounds, among others, that "the ordinance as amended is lacking in uniformity, is arbitrary and discriminatory, constitutes special legislation and denies the defendant the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States" (Record 43). On February 15, 1955, the Circuit Court of Peoria County entered an order overruling appellant's motion to dismiss the complaint. On July 19, 1955, appellee filed a supplemental complaint. On September 7, 1955, appellant again filed a motion to dismiss the complaint setting forth its objections to the ordinance on the grounds that its provisions were contrary to the Fourteenth Amendment of the Constitution of the United States (Record 43-54). Said motion having been overruled the appellant on October 3, 1955, filed its answer to the complaint and by paragraph 32 thereof affirmatively averred that the provisions of the ordinance in dispute were violative of the provisions of the Fourteenth Amendment to the Constitution of the United States.

On April 18, 1956, the appellee filed its motion for Summary Judgment in the Circuit Court of Peoria County, Illinois, together with its affidavits in support thereof. On August 14, 1956, the Circuit Court of Peoria County entered judgment on appellee's motion for Summary Judg-

ment, against the appellant in the sum of $41,707.03, without opinion.

The appellant prosecuted its appeal to the Supreme Court of Illinois and on December 6, 1956, filed in the office of the Clerk of that Court its brief. As grounds for reversal appellant urged that the ordinance was contrary to the provisions of the 14th Amendment to the Constitution of the United States in that it:

(a) Is special legislation depriving appellant of its property without due process of law,

(b) Is a tax measure not uniform in respect to persons and properties within the municipality,

(c) Grants a Special privilege and immunity,

(d) Delegates legislative power to change the terms of an ordinance to a Board of Arbitrators.

(e) The City had no power to enact the ordinance here in dispute (Record 283).

The Supreme Court of Illinois ignored the federal questions presented. In arriving at its judgment the Court said:

> "Defendant attacks the validity of the ordinance on many grounds, contending that it cannot be sustained either under the City's regulatory power or its taxing power. We find it unnecessary to consider or discuss the validity of the ordinance as a revenue measure, for we are of the opinion that it is a valid exercise of the City's Regulatory powers . . ."

The opinion did not discuss or consider any of the points raised by the pleadings and briefed by the parties.

THE QUESTIONS ARE SUBSTANTIAL.

The Judgment of the Court below is not supported by adequate non-federal grounds and therefore the federal questions presented must be considered and determined by this Court: Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157; Ward v. Board of

County Commissioners, 253 U. S. 17; Postal Telephone Cable Co. v. Newport, 247 U. S. 464; Lawrence v. State Tax Commission, 286 U. S. 276; Davis v. Wechsler, 263 U. S. 22. In the case of Ward v. Board of County Commissioners, supra, the Court at page 21 said:

> ". . . if non federal grounds plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

and likewise in Lawrence v. State Tax Commissioners, supra, the Court said at page 282:

> "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. . . . . We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

At every stage of the proceedings this appellant by its pleadings, brief and argument has urged that the tax imposed by the ordinance in question violates the provisions of the 14th Amendment of the Constitution of the United States. Notwithstanding, the Supreme Court of Illinois, for the first time in the history of the case, injects the theory that the ordinance is regulatory and decides the

case on that basis. This, of course, being a different theory than that upon which the case was pleaded, tried and appealed, and one which is completely unsupported by the record.

Appellee's complaint avers its right to recover on the theory "defendant has not paid the compensation due for the months of January . . . 1954." Its supplemental complaint repeats its right to recover on the ground "defendant has not paid the compensation due for the months of July, August, etc." The complaint, supplemental complaint and motion for summary judgment filed by the City does not allege the ordinance as regulatory in character or that it provides for license or regulatory fees. The vital portions of the ordinance, Section XII (Record 21), is as follows:

> "Section 12—Compensation. The Company shall pay to the City as compensation for the use by the Company of the streets of the City and for the exercise by the Company of the rights and privileges herein granted to it, a percentage of the gross revenue derived by the Company from fares collected by it from the carriage of passengers for hire . . ."

In an effort to avoid the federal question, the Supreme Court of Illinois, for the first time, interjected the theory of a municipality's regulatory power.

The clear and unambiguous language of the ordinance clearly shows it to be a revenue measure which necessarily must comply with federal constitutional guarantees.

The precise question here presented is whether or not the City (appellee) had the power to make a taxing contract in the nature of a franchise ordinance. If not, appellant has and is suffering a confiscatory deprivation of property without due process of law.

The question falls squarely within this Court's rulings in Railroad Commission of the State of California and City

of Los Angeles v. Los Angeles Railway Corporation, 280 U. S. 145; City of San Antonio v. San Antonio Public Service Company, 255 U. S. 547, which hold that municipalities do not have the power to surrender by contract a power of Government. This necessarily includes the power to tax. The San Antonio case (supra), more particularly holds that a municipality may not by ordinance enter into any agreement or contract making irrevocable grants or immunities where such is prohibited by State Constitution.

Section XII of the ordinance as amended provides:

> "In consideration of the compensation so to be paid by the company, the City shall impose upon the Company or its motor vehicles or other property, no license fees, vehicle taxes or other charges, taxes or assessments, of any kind or nature, for the use by the Company of the streets of the City, or for any other reason or purpose.
>
> "This paragraph shall not, however, be construed to exempt the Company from any general real estate or personal property taxes, or special assessments for which all other persons, firms or corporations are generally liable."

Article II, § 14 of the Illinois Constitution, provides:

> "No ex post facto law or law impairing the obligation of contracts, **or making any irrevocable grant of special privileges or immunities shall be passed.**" (Emphasis ours.)

The portion of the ordinance quoted above shows that a consideration for the payment by the defendant was the agreement by the City to give defendant an irrevocable immunity from all forms of taxation, license fees, vehicle taxes or any other charges that the City could make except property taxes or special assessments.

There could hardly be a clearer illustration of a violation of the Illinois constitutional provision. In San Antonio v.

San Antonio Public Service Co., supra, at page 555 this Court stated:

". . . And we think it equally clear that as to the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate—a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract—it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

"Primarily the answer to that question must depend upon whether the Ordinance of 1899, fixing the 5 cents rate, was a contract. That it was not and could not be, we are of opinion, is the necessary result of the provision of § 17, article 1, of the state Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the Ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established, by the ruling in the Altgelt case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

And in Railroad Commission v. Los Angeles Railway Corp., supra, p. 153:

"The surrender by contract of a power of Government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it must be closely scrutinized. . . . The gen-

eral powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. The charter gave to the council the power by ordinance . . . to regulate telephone service and the use of telephones within the city . . . and to fix and determine the charges for telephones and telephone service and connections. This is an ample authority to exercise the governmental power . . . but entirely unfitted to describe the authority to contract. It authorizes command but not agreement."

The issues here submitted are of importance to the passenger motor bus industry and the public insofar as it affects their rights to provide and receive the best possible service for the lowest possible cost. Congress has not been unmindful of the problem. Last year by the enactment of Public Law 347 Congress gave recognition that mass transportation is essential to the economic life of a municipality and that if this service is to be maintained at reasonable rates of fare, the operating companies must be relieved of confiscatory tax burdens.

It is submitted that the decision of the Illinois Supreme Court fails to recognize the limitation of the municipality to enter into this type of contractual ordinance. We believe that the questions presented by this appeal are substantial and that they are of grave public importance.

Respectfully submitted,

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APPENDIX A.

Docket No. 34260—Agenda 27—January, 1957.

The City of Peoria, Appellee, v. Peoria Transit Lines, Inc., Appellant.

Mr. Justice Schaefer delivered the opinion of the court:

The circuit court of Peoria County entered a summary judgment for $41,707.03 in favor of the city of Peoria and against Peoria Transit Lines, Inc. The judgment was based on defendant's failure to pay amounts alleged to be due under a franchise ordinance. The validity of the ordinance is challenged on constitutional grounds, and this court has jurisdiction on direct appeal.

The ordinance was adopted in 1946. It granted the defendant the exclusive right to operate a motor bus system on the streets of the city, and it provided that the defendant should pay to the city, "as compensation for the use by the company of the streets of the City and for the exercise by the Company of the rights and privileges hereby granted to it, a percentage [basically 2½%] of the gross revenue derived by the Company from the fares collected by it * * *."

Defendant accepted the terms of the ordinance and paid the compensation specified from the time it commenced operations in 1946 until January 1, 1954. It made no payments from that date until it ceased to do business and transferred its assets to another company on May 4, 1955. Judgment was entered for the amount that became due under the terms of the ordinance during this period, plus interest.

Defendant attacks the validity of the ordinance on many grounds, contending that it cannot be sustained either under the city's regulatory power or its taxing power. We

find it unnecessary to consider or to discuss the validity of the ordinance as a revenue measure, for we are of the opinion that it is a valid exercise of the city's regulatory powers, particularly under the following grants of authority: "to regulate the use of the streets * * *" and "to license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation." Ill. Rev. Stat. 1955, chap. 24, pars. 23-10, 23-51.

The present ordinance is a typical public utility franchise ordinance. Defendant's attack upon it is based primarily on **Chicago Motor Coach Co. v. City of Chicago**, 337 Ill. 200. That case involved the power of the city to prohibit the operation of the company's busses. It has been regarded as holding (1) that the Public Utilities Act had so occupied the field as to repeal the right of a municipality to grant or deny permission to utilities to use its streets, and (2) that the municipality had no power to prohibit the operation of a bus service upon its streets because "automotive vehicles" were "lawful means of conveyance" and had "equal rights upon the streets with horses and carriages." (See **City of Geneseo v. Illinois Northern Utilities Co.**, 378 Ill. 506, 518.) The first of these propositions was expressly overruled in the **City of Geneseo case**. The second does not concern us; for unlike the **Motor Coach case** the city's effort here was to regulate and not to prohibit.

Unquestionably the city had power to regulate. That power was expressly recognized in the **Motor Coach case**, except as it was thought to have been repealed by implication by the Public Utilities Act. In that case the court said, "Under the powers granted to city councils by the various clauses of section 1 of article 5 of the Cities and Villages Act, the city of Chicago, and many other cities

and villages in the State, prior to the going into effect of the Public Utilities Act of 1913 (Laws of 1913, p. 459), which became effective on January 1, 1914, properly enacted many ordinances providing rules for the regulation of public utilities and from time to time amended and changed such rules. The ordinances were authorized by the legislature and compliance with them by the public utilities was required by the courts." (337 Ill. at 207.) Since it is the city's power to regulate that is here involved, defendant's argument that because the city lacked the power to prohibit the operation of its busses there was no consideration for its undertakings is wide of the mark. **People ex rel. Hoyne v. Chicago Motor Bus Co.**, 295 Ill. 486,

On the authority of **Village of Lombard v. Illinois Bell Telephone Co.**, 405 Ill. 209, and **City of Chicago Heights v. Public Service Co.**, 408 Ill. 310, defendant argues that the ordinance is invalid because the city lacks the power to require it to pay a percentage of its gross receipts. Neither of those cases involved a franchise ordinance that had been accepted by the utility. Each ordinance was regarded by the court as a revenue ordinance, and authority to tax the activities there involved had not been granted to the municipalities. Cf. Ill. Rev. Stat. 1955, chap. 24, par. 23—21 with par. 23—51.

In **City of Chicago Heights v. Public Service Co.**, 408 Ill. 310, 318, it was also pointed out that a tax or fee based on gross receipts, when applied to a telegraph company, bore no relation to the amount of space in the streets occupied by the utility, and so was arbitrary and discriminatory. That argument is not available here, for in the case of a company operating moving vehicles on the streets, it is not unreasonable to assume a direct correlation between gross receipts from fares and intensity of use of the streets. Neither the pleadings nor the proof suggests that the amount charged exceeded the cost of regulation, and in

any case the amount charged was that to which the defendant had agreed.

The provision of the ordinance that exempts the company from other license fees and vehicle taxes, and that which provides for arbitration of the amount of compensation at five-year intervals, are also attacked. As to the former, it is difficult to see how the defendant has been injured by the provision that it now attacks. Moreover, as to both provisions, we are of the opinion that the defendant is estopped to urge the objection it now raises by reason of its acceptance of the ordinance. **Chicago General Railway Co. v. City of Chicago**, 176 Ill. 253; **People ex rel. Jackson v. Suburban Railroad Co.**, 178 Ill. 594; **Commonwealth Electric Co. v. Rose**, 214 Ill. 545.

By the ordinance the city agreed to place the money paid by the defendant as compensation into a special "Street Improvement Fund" which would be used solely for street repair and maintenance. The city did not do so, and the defendant contends that because the city has itself breached the ordinance it cannot recover. During the period from September, 1946, to January, 1954, defendant paid $267,216.66 to the city as compensation under the ordinance. During this period the city spent annually between $500,000 and $1,000,000 for street repair and maintenance. It does not appear that the defendant ever complained of the city's failure to establish a special fund until this action was filed. Under these circumstances, the breach does not appear to have been material, and in any case it has been waived by defendant's continued performance without insisting on strict compliance with the ordinance.

The judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

APPENDIX B.

Ordinance No. 5397 adopted by Council entitled—

"An ordinance granting a franchise to the Peoria Transportatiaon Company, an Illinois Corporation, its successors and assigns, to maintain and operate a motorbus system for the transportation of passengers for hire over, along and upon the streets of the City of Peoria, Illinois."

Section 2.—Nature of Grant: The authority, right, privileges and franchise are hereby granted to the Peoria Transportation Company, an Illinois Corporation, its successors and assigns, for a period of twenty (20) years from and after the 14th day of September, A. D. 1946, to furnish a system of local public transportation service for the carriage of passengers for hire within the City. Such transportation service shall be operated by trackless motor vehicles self-propelled by power generated by gasoline, crude oil, electricity or otherwise, over, along and upon the streets of the City.

Section 3.—Routes.

Section 4.—Fares.

Section 5.—Schedules.

Section 6.—Traffic Regulations.

Section 7.—Equipment.

Section 8.—Stop Zones.

Section 9.—Insurance.

Section 10.—City to Be Indemnified.

Section 11.—Forfeiture.

Section 12.—Compensation: The Company shall pay to the City as compensation for the use by the Com-

pany of the streets of the City and for the exercise by the Company of the rights and privileges herein granted to it, a percentage of the gross revenue derived by the Company from fares collected by it from the carriage of passengers for hire, provided, however, that the words "gross revenue" as used in this Section are hereby defined to be that proportion of total gross revenues derived by the Company from fares collected by it for the carriage of passengers for hire as the number of the bus miles operated per annum over streets under the jurisdiction of the City bears to the total number of bus miles operated by the Company per annum.

The amount of such compensation shall be computed as follows:

2% of such total gross revenues up to and including $1,600,000;

2½% on the amount of such gross revenue in excess of $1,600,000, and up to and including $1,700,000;

3% of such gross revenue as shall be in excess of $1,700,000.

In consideration of the compensation so to be paid by the Company to the City, the City shall impose upon the Company or its motor vehicles, or other property, no license fees, vehicle taxes or other charges, taxes or assessments, of any kind or nature, for the use by the Company of the streets of the City, or for any other reason or purpose. This paragraph shall not, however, be construed to exempt the Company from any general real estate or personal property taxes, or special assessments for which all other persons, firms or corporations are generally liable.

The Compensation payable by the Company to the City for any month following the commencement of the operations of its motor coaches, as herein provided,

shall be payable on or before thirty (30) days from the end of said calendar month, provided, however, that for any one month the Company shall be obligated to pay only 2 per cent of the gross revenues for such month, as hereinabove determined.

Within sixty (60) days of the end of each calendar year the Company shall thereupon transmit to the City the balance of any compensation that may be due to the City for such calendar year.

At the end of the first 5-year period of the term of the within franchise, and at periodic 5-year intervals thereafter, the compensation to be paid by the Company to the City as provided herein shall be subject to review for the purpose of determining whether a lesser or a larger amount of compensation shall be paid to the City for said succeeding 5-year period. Either party hereto shall give to the other not less than thirty (30) days' notice in writing of its desire to negotiate with the other party with a view of arriving by mutual agreement at the amount of compensation to be paid by the Company to the City for said succeeding 5-year period. If such mutual agreement shall be arrived at, it shall be reduced to writing and executed on behalf of each of the parties hereto and such writing shall govern the amount of compensation to be paid for said succeeding 5-year period. Until any agreement shall be reached in writing on any change in compensation, the compensation herein provided for shall continue and govern.

In the event that the parties hereto are unable to mutually agree on a change in compensation for said succeeding 5-year period within sixty (60) days after the receipt of the notice hereinabove mentioned, the matter of such change of compensation shall be submitted to a board of three arbitrators, one of which shall be selected by each of the parties hereto and the

third of which shall be selected by the two arbitrators so appointed. Such board of arbitrators shall hold hearings, take evidence and enter its award within ninety (90) days from the date of the appointment of said Board.

In no event shall the compensation to be paid by the Company to the City on the first $1,600,000 of its gross revenues as hereinabove defined, exceed the sum of 2% thereof, or be reduced below the amount of 2% thereof. In no event shall the amount of compensation to be paid on such revenues as hereinabove defined in excess of $1,600,000 and up to and including the sum of $1,700,000, exceed the sum of 3% of such excess, or be reduced below 2% thereof, and in no event shall the amount of compensation to be paid on such revenues on the excess over $1,700,000 exceed the sum of 5% thereof, or be reduced below the sum of 2% thereof, and the Board of Arbitrators herein provided for shall be bound by the limitations herein set forth. Within such limitations the award of the arbitrators shall be final and binding upon the parties.

Section 13.—Employees.

Section 14.—Enforcement.

Section 15.—Ordinance Effective.

Section 16.—Commencement of Operations.

Section 17.—Performance Bond of $100,000 required.

Section 18.—Illinois Commerce Commission.

Section 19.—Non-Liability of City.

Section 20.—Financial Reports.

Section 21.—Acceptance.

Section 22.—Legality.

Section 23.—Ordinance Effective.

An ordinance to amend ordinance No. 5397:

"**Section 4.** Section XII is hereby amended by striking out said Section XII and inserting in lieu thereof the following:

'Section XII:

Compensation. The Company shall pay to the City as Compensation for the use by the Company of the streets of the City and for the exercise by the Company of the rights and privileges herein granted to it, a percentage of the gross revenue derived by the Company from fares collected by it from the carriage of passengers for hire provided, however, that the words "gross revenue" as used in this Section are hereby defined to be that proportion of total gross revenues derived by the Company from fares collected by it for the carriage of passengers for hire as the number of the bus miles operated per annum over streets under the jurisdiction of the City bears to the total number of bus miles operated by the Company per annum.

The amount of such compensation shall be computed as follows:

2½% of such total gross revenue up to and including $1,700,000;

3% of such gross revenue as shall be in excess of $1,700,000.

In consideration of the compensation so to be paid by the Company to the City, the City shall impose upon the Company or its motor vehicles, or other property, no license fees, vehicle taxes or other charges, taxes or assessments, of any kind or nature, for the use by the Company of the streets of the City, or for any other reason or purpose. This paragraph shall not, however, be construed to exempt the Company from any general real estate or personal property taxes, or special assessments for which all other persons, firms or corporation are generally liable.

The Compensation payable by the Company to the City for any month following the commencement of the operations of its motor coaches, as herein provided, shall be payable on or before thirty (30) days from the end of said calendar month, provided, however, that for any one month the Company shall be obligated to pay only 2½ per cent of the gross revenues for such month, as hereinabove determined.

Within sixty (60) days of the end of each calendar year the Company shall thereupon transmit to the City the balance of any compensation that may be due to the City for such calendar year.

At the end of the first 5-year period of the term of the within franchise, and at periodic 5-year intervals thereafter, the compensation to be paid by the Company to the City as provided herein shall be subject to review for the purpose of determining whether a lesser or a larger amount of compensation shall be paid to the City for said succeeding 5-year period. Either party hereto shall give to the other not less than thirty (30) days' notice in writing of its desire to negotiate with the other party with a view of arriving by mutual agreement at the amount of compensation to be paid by the Company to the City for said succeeding 5-year period. If such mutual agreement shall be arrived at it shall be reduced to writing and executed on behalf of each of the parties hereto and such writing shall govern the amount of compensation so to be paid for said succeeding 5-year period. Until any agreement shall be reached in writing on any change in compensation, the compensation herein provided for shall continue and govern.

In the event that the parties hereto are unable to mutually agree on a change in compensation for said succeeding 5-year period within sixty (60) days after

the receipt of the notice hereinabove mentioned, the matter of such change of compensation shall be submitted to a board of three arbitrators, one of which shall be selected by each of the parties hereto and the third of which shall be selected by the two arbitrators so appointed. Such board of arbitrators shall hold hearings, take evidence and enter its award within ninety (90) days from the date of the appointment of said Board.

In no event shall the compensation to be paid by the Company to the City on the first $1,600,000 of its gross revenues as hereinabove defined, exceed the sum of 2½% thereof, or be reduced below the amount of 2½% thereof. In no event shall the amount of compensation to be paid on such revenue as hereinabove defined in excess of $1,600,000 and up to and including the sum of $1,700,000, exceed the sum of 3% of such excess, or be reduced below 2½% thereof, and in no event shall the amount of compensation to be paid on such revenues on the excess over $1,700,000 exceed the sum of 5% thereof, or be reduced below the sum of 2½% thereof, and the Board of Arbitrators herein provided for shall be bound by the limitations herein set forth. Within such limitations, the award of the arbitrators shall be final and binding upon the parties.

City agrees, in consideration of the payment of the compensation set forth in this Section, to place the funds derived as compensation, as herein provided, in a special fund to be known as "Street Improvement Fund," and that said Fund shall be used solely for the purpose or purposes of repairing, maintaining, paving or repaving and surfacing or resurfacing of the public streets in the City of Peoria.' "

"Section 6. By adding the following Section to be known as Section XXIV.

'Section XXIV.

Company agrees, on demand of City, or prior thereto, to transfer, convey and assign to City all of the Company's rights, title and interest in and to all of the railway tracks, ties and roadbed now in and upon the paved public streets of the City and in consideration thereof and upon the transfer, assignment and conveyance thereof to the City, same shall ipso facto constitute a complete release and discharge by the City of the Company and any and all of its predecessors of and from any and all liability of the Company, or any of its predecessors to remove said tracks, ties and roadbed, pave, repave or repair any of the streets of said City.' "

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No. 780.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

PEORIA TRANSIT LINES, INC., a Corporation,
Appellant,

v.

CITY OF PEORIA, a Municipal Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

MOTION TO DISMISS.

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Appellee.

On Appeal from the Supreme Court of the State of Illinois.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16, moves to dismiss this appeal on the grounds: (a) that there is not drawn in question the validity of a city ordinance having the effect of a statute as required by Title 28, United States Code, Section 1257 (2); and (b) that the appeal does not present a substantial federal question.

STATEMENT.

This case involves a typical public utility franchise. Appellant was incorporated for the express purpose of obtaining a franchise from Appellee, and a Certificate of Public Necessity from the Illinois Commerce Commission to operate motor buses as a public utility.

Appellant obtained the franchise from Appellee before it obtained a Certificate from the Illinois Commerce Commission. This franchise, adopted in 1946, and accepted by Appellant granted to Appellant and its successors and assigns the exclusive right to operate a motor bus system on the streets of Peoria, and provided for the payment of compensation to Appellee for the exercise of the rights and privileges granted to Appellant.

Appellant paid the compensation provided for more than eight years, but made no payments after January 1, 1954.

Suit was instituted in August, 1954, to collect the compensation due under the franchise, and while the suit was pending, Appellant transferred its assets to another company and ceased to do business.

Judgment was entered in August, 1956, by the Circuit Court of Peoria County for the amount due under the terms of the franchise during the period from January 1, 1954 to May 4, 1955, the date of the transfer of assets to the other company.

The judgment was affirmed by the Illinois Supreme Court on the grounds: (1) that there was consideration for the undertaking of Appellant to pay compensation; (2) that the amount provided for as compensation did not exceed the cost of regulation and that it was the amount to which Appellant had agreed; (3) that Appellant is estopped to urge the objections which it now raises by reason of its acceptance of the franchise; and (4) Appellee had the power under the laws of Illinois to regulate.

ARGUMENT.

I.

Franchise Not a State Law.

This case involves a typical public utility franchise, which was accepted and acted upon by Appellant and thereupon became a binding contract, which the Appellant is estopped from repudiating.

Only general ordinances having the effect of a general legislative enactment are within the purview of Title 28, United States Code, Section 1257 (2). **John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100; Reinman v. Little Rock, 237 U. S. 171; Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548.**

It is clear, therefore, that this case does not involve the type of ordinance required for jurisdiction in this Court.

II.

No Federal Question Involved.

It is essential to the exercise of this Court's jurisdiction that a substantial federal question be raised before the State Court. The Illinois Supreme Court did not decide any federal question. Appellant attempts to hurdle this obstacle by stating that a substantial federal question was raised and ignored by the Illinois Supreme Court.

In its brief, filed with the Illinois Supreme Court, Appellant relied upon the following points:

I. **The Ordinance as Amended Is Special Legislation Depriving Defendant of Its Property Without Due Process of Law, Contrary to Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Federal Constitution.**

II. **The Ordinance as Amended, as a Tax Measure, Violates Article XI, Section 9 of the Constitution of**

Illinois, in That It Is Not Uniform in Respect to Persons and Property Within the Municipality.

III. The Ordinance Grants a Special Privilege and Immunity Contrary to Article II, Section 14, of the Illinois Constitution.

IV. The Ordinance as Amended Is Unconstitutional Because It Delegates Legislative Power to Change the Terms of the Ordinance to a Board of Arbitrators.

V. The Purported Contract Between Plaintiff and Defendant for Use of the Streets by Virtue of the Ordinance and Its Acceptance Is Without Consideration Because Plaintiff Gave Nothing to Defendant for the Percent of Gross Income. Defendant Had a Right to Use the Streets to Operate Motor Buses Without Any Grant From Plaintiff.

VI. The City Has Only Such Powers as Have Been Granted to It By the Legislature By Statute. There Is No Statute Giving the City the Power to Enact the Ordinance Here in Question.

VII. The City Has No Power to Charge a Percent of Gross Receipts for Use of Streets by Buses.

The only reference to the Fourteenth Amendment to the Federal Constitution was in Point I. Of the thirty-two pages of Argument contained in its brief, slightly more than one page was devoted to Point I.

For the convenience of the Court there is set forth in the Appendix to this Motion, the **Points and Authorities** set forth in Appellant's Brief, and the Argument therein as relates to Point I.

This Court has no jurisdiction to re-examine the judgment of a State Court unless the record shows that a federal question necessary to the determination of the case is involved. **Durley v. Mayo, 351 U. S. 277.**

The record in this case shows no such question to be involved.

III.

The Federal Question Presented Is Not Substantial.

It is startling to observe that the due process clause of the Federal Constitution is attempted to be used as an excuse to break a contract.

Certainly it requires no citation of authorities that the prohibition against taking property without due process of law has no application to the payment of money due under a contract.

Mackay Telegraph Co. v. Little Rock, 250 U. S. 94, involved a franchise ordinance providing for a "license or tax of 50 cents per pole." The company accepted the franchise and then didn't pay the fees. Suit was instituted in the State Court and the company appealed to this Court. One of the grounds raised by the company was that the franchise deprived it of property without due process of law. This Court noted that the State Court dealt with the ordinance as a license tax even though the ordinance was contractual in nature and therefore said it must be so regarded. Notwithstanding, this Court held that the company was liable, and that there was no ground for holding that the company was subjected to unreasonable discrimination in contravention of the equal protection clause of the Fourteenth Amendment.

Zucht v. King, 260 U. S. 174, is directly in point, and requires no discussion.

The Supreme Court of Illinois held that the franchise was a valid exercise of the city's regulatory powers under the State law.

The decision of the highest State Court that the franchise is within the powers conferred by the legislature is conclusive on this Court. **Thomas Cusack v. Chicago, 242 U. S. 526; Schmidinger v. Chicago, 226 U. S. 578; Fischer v. City of St. Louis, 194 U. S. 361.**

Appellant relies upon City of Antonio v. San Antonio Public Service Co., 255 U. S. 547, and Railroad Commissioners v. Los Angeles Railway Corporation, 280 U. S. 145, as indicating a substantial federal question is involved in this case.

Neither of these cases are in point. Both came up on appeal from decisions of lower federal courts.

Both cases involved the question of rates being fixed by franchise ordinances, which were alleged to be confiscatory.

In both cases this court recognized the rule that it was bound by the State law as decided by the highest court of that State.

In the City of Antonio case, this Court held that under the State Constitution and its own previous decision the ordinance was not a contract. In the Los Angeles Railway case, this Court said there was no decision of the highest State Court for it to follow.

Accordingly, Appellant has failed to present any substantial question of "due process" or "equal protection" under the Fourteenth Amendment.

Conclusion.

We respectfully submit that this appeal should be dismissed. We further respectfully submit that there is no reasonable ground for granting a petition for writ of certiorari pursuant to the provisions of Title 28, United States Code, Section 2103. We further request the Court to adjudge Appellee reasonable damages for its delay and double costs.

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POINTS AND AUTHORITIES.

I. The ordinance as amended is special legislation depriving defendant of its property without due process of law, contrary to Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Federal Constitution.

A. The ordinance singles out this defendant from all users of the city streets and requires it alone to pay for use of the streets. Due process of law guarantees a person the right to be governed by a general law applicable to all similarly situated.

Metropolitan Trust Co. v. Jones, 384 Ill. 248, 253.

II. The ordinance as amended, as a tax measure, violates Article XI, Section 9, of the Constitution of Illinois, in that it is not uniform in respect to persons and property within the municipality.

A. Article XI, Section 9, of the Illinois Constitution, provides that any tax made by municipal authorities must be uniform as to persons and property within its jurisdiction.

1. The city has contended it has a right to assess this 3% levy on gross receipts under Ch. 24, Ill. Rev. Stat., par. 23-53, wherein it is authorized to tax vehicles conveying loads within the municipality.

2. The 3% charge on this defendant alone to the exclusion of all others violates the requirement of uniformity as to persons.

III. The ordinance grants a special privilege and immunity contrary to Article II, Section 14, of the Illinois Constitution.

A. Section XII of the ordinance provides that in consideration of the payment by defendant it is granted im-

munity from all license fees, charges, taxes or assessments except property taxes and special assessments.

B. Article II, Section 14 of our Constitution, prohibits any irrevocable grant of special privileges or immunities which in Callaghan & Co. v. Burdette J. Smith, 304 Ill. 532, was held to be violated where one company was granted the right to publish a statute purporting to be under State authority.

C. The grant of immunity from taxes in the present case violates this constitutional provision.

D. Where part of the consideration for a promise is illegal, the whole transaction or contract is void.

Henderson v. Palmer, 71 Ill. 579;
Estate of Ramsay v. Whitbeck, 183 Ill. 550, 556;
Lyons v. Schambacher, 316 Ill. 560;
Vock v. Vock, 365 Ill. 432, 434;
Simpson v. Adkins, 386 Ill. 64.

IV. The ordinance as amended is unconstitutional because it delegates legislative power to change the terms of the ordinance to a board of arbitrators.

A. Section XII of the ordinance provides that the percentage of gross revenue to be paid is subject to change at 5-year intervals between certain limits by a board of arbitrators.

B. An ordinance was held unconstitutional as an unlawful delegation of legislative power which left to the discretion of the city treasurer to fix the amount of a liquor license not to exceed $50. City of East St. Louis v. Wehrung, 50 Ill. 28; the ordinance was held void where the mayor was authorized to fix the license fee between $2 and $10, Naegle v. City of Centralia, 81 Ill. App. 334.

C. Only a city council by ordinance has the power to amend an ordinance.

Hibbard & Co. v. City of Chicago, 173 Ill. 91, 97;
City of Litchfield v. Hart, 306 Ill. App. 621, 624.

V. The purported contract between plaintiff and defendant for use of the streets by virtue of the ordinance and its acceptance is without consideration because plaintiff gave nothing to defendant for the percent of gross income. Defendant had a right to use the streets to operate motor buses without any grant from plaintiff.

A. It has been definitely decided by this court that a company has the right to operate motor buses upon city streets without any grant or franchise from the city; that there is no statutory authority permitting a city to require a grant from itself.

Chicago Motor Coach Company v. City of Chicago, 337 Ill. 200.

B. The legislature recognized there was no such statutory authority in a city to require a grant or franchise for motor buses because it expressly enacted such a statute in Ch. 24, par. 21-44, but limited it solely to the City of Chicago.

C. The case of Lustfield v. Chicago Transit Authority, 408 Ill. 404, quoted the Chicago Motor Coach Co. case as establishing the law that motor buses do not need a grant from a city to operate on city streets.

D. A company which agreed to pay a consideration for a grant of purported authority to lay tracks, when the grantor had no power to make such a grant, received no consideration for its promise and was not estopped by accepting the ordinance granting such alleged authority to raise the question of lack of consideration.

South Park Commissioners v. Chicago City Railway, 286 Ill. 504.

VI. The city has only such powers as have been granted to it by the legislature by statute. There is no statute giving the city the power to enact the ordinance here in question.

A. A city has only such powers as are expressly granted to it by statute which must be strictly construed.

City of Chicago Heights v. Western Union, 406 Ill. 419, 433.

Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209.

B. While the city has express statutory authority to prohibit the laying of street railway tracks in its streets (Ch. 24, par. 23-29; Ch. 131¼, par. 1-4); to prohibit the occupancy of streets by telegraph poles, wires, etc (Ch. 134, par. 4), it has no such power to prohibit the use of streets by motor buses.

VII. The City Has No Power to Charge a Percent of Gross Receipts for Use of Streets by Buses.

A. An ordinance which required payment of 3% of gross revenues for occupying streets with poles and wires was held invalid because the city has no power to rent or charge for use of streets, nor tax gross receipts for revenue purposes.

Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209.

B. An ordinance which required payment of a sum per pole per year and so much per foot for wire occupying streets was held invalid as not being a regulatory ordinance for which a fee was charged to cover the cost of such regulation, but was a revenue measure beyond the power of the city.

Chicago Heights v. Western Union Telegraph Co., 406 Ill. 428.

C. An ordinance which required payment of 2% of gross revenues for occupying streets with poles and wires was held invalid as lacking in uniformity because the fee had no relation to the amount of space used, and furthermore, was beyond the power of the city:

City of Chicago Heights v. Public Service Co., 408 Ill. 34.

ARGUMENT.

I. The ordinance as amended is special legislation depriving defendant of its property without due process of law contrary to Article II, Section 2, of the Illinois Constitution and the Fourteenth Amendment to the Federal Constitution.

The ordinance as amended exacts a sum of money for use of the streets from this defendant alone. It does not even attempt to levy this exaction upon any class to which this defendant might belong. It singles this defendant out by name as the sole subject to pay tribute to the city for the use of the streets.

Due process requires that laws be general in their terms. If a law even singles out one group of persons (much less one particular person) to the exclusion of others similarly situated, it violates due process. In Metropolitan Trust Co. v. Jones, 384 Ill. 248, 253, this court stated:

> "Due process of law contemplates a general public law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals."

Taxicab operators are not charged for use of the streets. Operators of delivery businesses by trucks who use the streets are not charged for their use. Trucking companies making use of city streets to carry on their businesses are not charged. Other bus companies using city streets are not charged for use of the streets. The sole and only users of city streets required to pay for such use is this defendant.

This ordinance, therefore, violates the constitutional right of this defendant to be governed by a general law and not subject to a special law which singles it out by name from among all users of city streets and requires it alone to pay for the use of the streets.